

Women in Power Forum
November 3, 2005

Good afternoon. It is a pleasure to be here today amongst such a distinguished group of women. I must thank the Patton Boggs law firm and Debbie Swanstrom for inviting me to participate.

We were asked to discuss issues in the electric industry that are of particular concern to us, as well as how women can work together to improve the industry. I want to take this opportunity to speak about an issue that has had, and if unchecked will continue to have an impact on the financial soundness of all of our regulated utilities. I have become concerned about the ability of state regulators to make independent decisions in light of the populist movements to appease consumers and the political pressure to make decisions that do not follow established law. The problems experienced recently in Illinois and a few years ago in my own state of Missouri could have an enormous negative impact on the power industries and I believe we need to address this problem straight on before more damage is done.

I would liken the problem affecting our regulatory decision-making to the political move to unseat so-called “activist” judges. Partisan politicians and interest groups are attacking the judiciary and calling for some judges to be removed from the bench. These people are unhappy with court decisions that are incompatible with their political agendas, or their chances for re-election and accuse some judges of allowing improper outcomes when, in fact, those judges appropriately are following established law.

While researching materials for this discussion, I came across a list of definitions of the term “judicial independence”. There were many eloquent statements, but my favorite was from the Brennan Center for Justice Resources:

“Judicial independence is the freedom we give judges to act as principled decision-makers. The independence is intended to allow judges to consider the facts and the law of each case with an open mind and unbiased judgment. When truly independent,

judges are not influenced by personal interests or relationships, the identity or status of the parties to a case, or external economic or political pressures.”¹

Now, you may be wondering why I’m quoting a definition for judicial independence. But I think that this definition could easily be applied to regulatory independence. We, as commissioners, must be able to make independent decisions based on established law and procedures. We must be able to base those decisions on the particular evidence presented to us by the parties. We are charged by our governing laws to balance the interest of the regulated utilities and their investors with the public interest, which means that we cannot bend to the will of the ratepayers when to do so would jeopardize the financial viability of the utility; nor can we bend to the will of the utilities when it is not in the best interest of the public. We must provide consistent and well-reasoned opinions. We must have adequate funding in order to have competent staff and to fulfill our obligations as state commissioners. Our decisions must not be influenced by popular opinion or political pressure. And we should not have to fear for our tenure as commissioners because of the political backlash from decisions that follow the law.

We can look at a concrete example of what happens when this “regulatory independence” is jeopardized. Recently, in Illinois in the wake of laws deregulating the electric industry, Governor Blagojevich began pressuring the Illinois Commerce Commission to reject proposals from ComEd and Ameren to purchase power through a market-based competitive process. These proposals were filed in accordance with the deregulatory plan established through the ICC’s collaborative Post-2006 Initiative, in which the Governor’s Office and the Consumer Advocate participated without objection. The Governor started his campaign against the ICC by sending a letter that basically ordered the Illinois commissioners to reject ComEd’s key proposal. In the letter he stated:

“I appointed members of the Commission to protect the consumer. It is your job to ensure that rates remain just and reasonable, and to reject filings that circumvent the law or the intention of the law. I consider an approval of a reverse auction procurement process of market-based rates for wholesale power either a serious neglect of duty or

¹ Brennan Center for Justice Resources: *Questions and Answers about Judicial Independence*. http://www.brennancenter.org/resources/resources_jiqanda.html 2001.

gross incompetence by the ICC. . . . Unless and until a competitive market develops, the request for higher rates must be rejected.”

Following this edict, Ed Hurley, the chair of the Illinois Commerce Commission was suddenly given another assignment, and Governor Blagojevich appointed the director of the consumer advocate office, who had been a party to the disputed cases, as chairman of the ICC. And during all of this, the Illinois Attorney General was filing a lawsuit to prevent the ICC from further considering these proposals.

Now, the new chairman of the Illinois Commission is arguing that ComEd’s parent company, Exelon should purchase electricity on the open market and resell it to ComEd customers below its cost of procurement. This is the business model that prevailed in California before its utilities went bankrupt and the lights began to go out.

With all of this disruption and uncertainty on the Illinois Commerce Commission, the Regulatory Research Associates, Inc.,² made the following decision:

“Due to the increased uncertainty created by the Governor’s micro-management of the regulatory process in Illinois, the potential removal of two experienced commissioners at a time when major policy issues are under consideration, and the potential for a consumerist philosophy under Mr. Cohen’s leadership, we are lowering our rating of Illinois regulation to Below Average/I from Average/3.”

In addition, ComEd and Ameren are on “credit watch” with negative implications by Moody’s and have been downgraded by S&P from A- to BBB+. This situation should cause serious concern.

An example of an incursion on regulatory independence from the legislative branch of government occurred on my Commission. During the 2000 – 2001 energy crisis, the price for natural gas spiked to \$9.98 per mmBTU and natural gas companies appeared before the Missouri Public Service Commission, filing applications for Purchased Gas Adjustments.

² Regulatory Research Associates, Inc. is an independent research organization that provides comprehensive and timely research and consultation services to the investment, corporate, and regulatory communities regarding public utility regulation, and the electric utility.

Under Missouri law, natural gas local distribution companies are entitled to recover the prudently-incurred costs of the natural gas commodity. The LDCs were entitled to file a PGA request to temporarily increase the amount charged to their customers in order to recover the actual, prudently-incurred costs of the commodity. I would note that these PGA increases are subject to an “Actual Cost Adjustment” that would result in a refund to the utility’s customers if the utility recovered more than its actual costs.

During the Missouri PSC’s final deliberation and vote on one of these PGA requests, a state representative, who had gotten wind of the potential rate increase, appeared before the Commission and requested to speak to the commissioners even though all of the parties to the case were not present. The then Chairman, abandoning established rules of procedure, allowed the state representative to address us. This politician began to castigate us, and actually threatened to file a resolution in the House to remove any commissioner who voted for the rate increase. The three women on the commission, of which I was one, voted to approve this PGA request as required by established law, with the result being that consumers’ natural gas bills increased temporarily.³

The state representative who made the very public threat promptly proceeded to file a resolution in the Missouri House, which was followed very shortly by a similar resolution in the Missouri Senate. The resolutions, which had to be approved by a two-thirds majority of each house, stated that the three of us had committed a “dereliction of duty” and were “incompetent”. While these resolutions were never called up for hearings, we commissioners who were included in the resolutions were uncomfortably aware of the imminent and unreasonable threat to our tenure and to our reputations.

I have brought these two situations to your attention to point out what can go wrong when executive officers and legislators interfere with utility regulators who assert their “independent decision-making authority” to reach conclusions that, while unpopular with consumers, fall within clearly established law. But, this is not to say that regulatory commissioners, like myself, are not accountable to governors and state legislators, or that they should not concern themselves with consumer rights.

³ Rate increase ranged from only 4% to 9%. Currently, some parts of the nation are looking at 70% increases, although Missouri’s is much lower.

Rather, regulatory commissioners must be aware of all mechanisms that provide accountability of our actions, while balancing the needs of consumers with the needs of utilities and their investors, and while consistently applying the law by which we are governed. These “accountability mechanisms” are many and strong.

With regard to governmental mechanisms, we do have some political accountability to the governor if appointed, or the voters if elected; and to the legislature who appropriates our budget and enacts the statutes that govern us. We also have governmental accountability through the transparent and open process that we engage in. And we cannot forget the judiciary that reviews our application of law and determines if we have provided adequate due process and are effectively carrying out our duties as commissioners.

But we also have non-governmental accountability that plays an important part in our decision-making. We are accountable to all stakeholders, including utility companies, investors, consumers and their advocates and other parties that can intervene in commission proceedings, such as environmental interests. We are also accountable to the media, financial markets and public interest groups that evaluate our work. All of this works to keep our decisions well-reasoned and in accordance with the established law.

With the new Energy Policy Act already working toward creating in some instances stronger oversight of the power industry, and in other instances a lighter governance, we state regulators must remain empowered to make independent decisions that balance the needs of all the parties in the most reasonable way possible. We must use our abilities to reason and argue for the need to maintain our independence. And we must use our intellect to apply the law with an even hand to achieve a fair balance in the administration of utility regulation.

Thank you very much. I look forward to hearing your views on this critical issue.